IN THE

Supreme Court of the United States

No. 78-255

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

SUTHERLAND MARINE COMPANY,
Petitioner

v.

TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY

and

TRUSTEE OF THE PROPERTY OF THE PITTSBURGH, YOUNGSTOWN & ASHTABULA RAILWAY COMPANY,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

MARK WILLCOX, JR.
HERBERT G. SCHICK
HEPBURN, ROSS, WILLCOX & PUTNAM
2010 Two Penn Center Plaza
Philadelphia, Pa. 19102
Attorneys for Trustee of The Pittsburgh, Youngstown & Ashtabula Railway Company, Secondary Debtor

CARL HELMETAG, JR.
EUGENE E. ANDERSON, JR.
3100 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
Attorneys for Trustees of Penn Central Transportation Company, Debtor

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF

TABLE OF CONTENTS

QUESTIONS PRESENTED

1. In a railroad reorganization, is an oral hearing necessary to dispose of a petition for the sale of assets where the issue is narrow, the relevant facts are set forth in written submissions to the Reorganization Court and no relevant material facts are disputed?

2. Was the Reorganization Court correct in approving a sale to the high bidder under a sealed bid procedure whereby two prospective purchasers—after one of them had made a formal offer for the property—were given an equal opportunity to bid and both were advised that the high bid received by a specified date would be recommended to the Trustees for acceptance?

STATEMENT OF THE CASE

During the period 1974-76, the Trustees of Penn Central Transportation Company (Penn Central) negotiated with two parties for the sale of 78 acres of riverfront land in Ashtabula, Ohio. The property is owned by The Pittsburgh, Youngstown & Ashtabula Railroad Company, a leased line which is included in the Penn Central reorganization as a secondary debtor. The first party to approach the agent of the Trustees was the Ashtabula Yacht Club (Yacht Club), which in 1974 indicated an interest in purchasing the 10.6 acres which it leases. Upon being advised that the tract would not be subdivided for sale, the Yacht Club persuaded Kister Construction Company (Kister) to join it in negotiating for purchase of the entire tract. Meanwhile, in 1975, Sutherland Marine Company (Sutherland), petitioner herein, expressed a desire to purchase the 5.5 acres leased to it. Upon being advised that only the entire tract would be sold and that other parties were interested in buying the property, Sutherland submitted a written offer on July 8, 1976, to buy the property for $454,000. The appraised value of the property was $354,740.

It is clear from the language of the instrument signed by Sutherland that the Trustees were not bound either to accept the offer (although higher than the appraisal) or to submit it to the Reorganization Court for approval. Section 8.2 of the instrument reads as follows:

> "8.2 *Binding Offer.* In consideration of the payment by Seller to Buyer of Ten Dollars ($10.00) and for other valuable consideration, receipt of which is hereby acknowledged by Buyer, Buyer agrees that its execution of this agreement and the delivery of same to Seller constitutes a binding and irrevocable offer by Buyer to purchase the Land on the terms and conditions herein contained and that, except as otherwise expressly provided herein, such offer shall remain binding on Buyer and subject to acceptance by Seller until one hundred twenty (120) days after Buyer's Delivery Date [August 31, 1976], or until Buyer notifies Seller that such offer has been revoked, whichever occurs later. Buyer understands and agrees further that, notwithstanding any action or performance heretofore or hereafter taken or rendered by Seller or any agent or employee of Seller arising out of or in connection with this agreement, Seller shall not be deemed to have accepted such offer, nor shall Seller have any liability whatsoever to Buyer with respect to the Land or arising hereunder, unless or until Seller executes this agreement and delivers the same to Buyer. Buyer understands further: that Seller will not execute or deliver this agreement unless the Court has issued an order, which Seller deems to have become final, approving the transactions contemplated by this agreement . . ."

Since there were two parties desiring to purchase the same property, the agent of the Trustees notified both parties that sealed bids for the property would be accepted until 12:00 noon on August 31, 1976. The Yacht Club and Kister were furnished the same form of agreement as that signed by Sutherland, and the parties were advised that the following procedure would govern in the opening of the bids: the Yacht Club-Kister joint bid would be opened first, and, if it were found to be lower than Sutherland's original offer, Sutherland's bid would remain sealed and its original offer would be recommended for acceptance by the Trustees; if the Yacht Club-Kister bid were higher than Sutherland's original offer, Sutherland's bid would be

opened and the higher of the two bids would be recommended for acceptance. Sutherland stood on its original offer of $454,000. Yacht Club-Kister submitted a bid of $465,500. The agent of the Trustees recommended that the Yacht Club-Kister bid be accepted, and so advised both bidders.

The Trustees accepted the high bid and petitioned the Reorganization Court under Section 77(o) of the Bankruptcy Act, 11 U.S.C. § 205(o), for approval of the sale. The Reorganization Court authorized the sale on the basis of the pleadings [1] without issuing an opinion. Sutherland appealed to the United States Court of Appeals for the Third Circuit, which dispensed with oral argument and unanimously affirmed the Reorganization Court's order. Sutherland then filed a petition for rehearing in banc, which was denied. After securing a stay of the mandate of the United States Court of Appeals, Sutherland has filed a petition for a writ of certiorari urging this Court to review the decisions of the courts below.

1. The circumstances of the sale, including the sealed bid procedure, were fully explained in the Trustees' petition for approval of the sale. Sutherland filed an answer contending that there should have been no bidding and that its offer should have been submitted to the Reorganization Court regardless of pending negotiations with Yacht Club-Kister. The Trustees then called the Court's attention to an earlier sale where similar objections to the use of the sealed bid procedure had been raised and where the Court had issued an opinion approving the sealed bid procedure and overruling the objections. This opinion is set forth on pages 7-9 of Sutherland's petition.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Satisfy the Requirements of Rule 19 of the Rules of the Supreme Court of the United States

It is beyond question that the petition does not meet the considerations of Rule 19 of the Rules of the Supreme Court of the United States. Sutherland agrees that this is so. Petition at 6. Not only does the case lack the specific grounds for review mentioned in the rule, there are clearly no "special and important reasons" of any kind which would justify invoking the certiorari jurisdiction.

The basis urged for granting the writ is to instruct "the lower court to hold the hearing originally requested by Petitioner and to make a proper record". Petition at 6. The reason advanced for the need for a hearing is to protect the integrity of judicial sales to ensure that the bankrupt estate realizes the maximum from the sale of its assets. Petition at 4, 5. While the Trustees believe that this objective is sound, they are unable to understand in what respect the procedure followed by the Reorganization Court resulted in the impairment of the integrity of judicial sales or how the Penn Central estate was prejudiced by the approval of a higher bid than Sutherland had made for the property.

II. Whether an Oral Hearing Should Be Held on a Petition for Approval of the Sale of Assets Rests Within the Discretion of the Reorganization Court

The proceedings under Section 77(o) of the Bankruptcy Act, 11 U.S.C. § 205(o), are in equity and summary in nature. There is no requirement in Section 77(o) that petitions to the Reorganization Court for approval of the sale of property be considered after an oral hearing.

Whether an oral hearing should be held is a matter left to the discretion of the Reorganization Court. *See Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 682 (1935); *DeMet v. Harralson*, 399 F.2d 35, 39 (5th Cir. 1968); *See also Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515, 526-27 (D. Colo. 1966). *Cf.* Rules of Bankruptcy Procedure, R. 8-510(a)(b). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Disposing of petitions for approval of the sale of assets without an oral hearing is appropriate in large reorganizations and particularly so in the case of the Penn Central reorganization, certainly one of the largest, if not the largest, in the history of reorganizations under the Bankruptcy Act, 11 U.S.C. §§ 1-775. Over the period of eight years in which Penn Central has been in reorganization, the Reorganization Court has been required to consider several hundred petitions for the approval of the sale of assets and a very large number of other petitions for approval of the establishment of proofs of claim procedure, approval of compensation to consultants and attorneys, and for a host of other activities growing out of the functioning of the Penn Central estate. In addition to the very large volume of petitions requiring judicial consideration and approval, the Court has been required to rule upon novel legal questions of the greatest importance, including the Trustees' Plan of Reorganization.[2] To enable the Court to handle this enormous work load superimposed upon its regular duties, there has been developed a no-oral-hearing procedure which permits the Court to decide many

2. *See, e.g.*, Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n., 383 F. Supp. 510 (E.D. Pa.) (concurring opinion) (constitutionality of Regional Rail Reorganization Act of 1973), *rev'd sub nom.* Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

matters upon petitions, affidavits, proposed forms of orders and responses thereto.

This procedure gives the objectors the right to ask for an oral hearing, however, and to present reasons why such a hearing should be held. If the Reorganization Court determines that an insufficient basis for an oral hearing has been presented, the decision is made upon the written submissions. Where the Court decides that an oral hearing is warranted, it is held, but in such instances the regular course has been to require the testimony to be submitted in the form of affidavits subject to cross-examination. This procedure parallels that used by the administrative agencies and is both expeditious and relatively inexpensive. It has been used for the majority of the petitions for approval of the sale of assets, where the issue is generally a narrow one—whether the price offered is in the best interests of the estate—and where the proceeding is essentially administrative in nature. In no instance has the United States Court of Appeals for the Third Circuit or this Court held that this procedure is inadequate to satisfy the requirements of procedural due process of law.

To grant Sutherland's request that the case be remanded to the Reorganization Court for an oral hearing, this Court would have to find either that the sealed bid procedure denies fundamental fairness or that the present application of that procedure violated due process. In the earlier opinion, set out in full in the petition at 7-9, the Reorganization Court, after oral hearing, determined that the sealed bid procedure was proper even if the amount of the original offer became known to other bidders.[3] In this case, Sutherland has not asserted any relevant material facts which are disputed and which require an oral hearing to determine.

3. This ruling seems clearly correct since such a disclosure would amount to no more than the Trustees' establishing an upset price before the bidding began.

A requirement that the Reorganization Court hold an oral hearing upon the request of a low bidder for property being sold would be totally unmindful of judicial economy and in many instances would result in delays which could frustrate a sale to the higher bidder to the disadvantage of the estate.

III. The Terms of Sutherland's Offer Permitted the Trustees to Accept Other Offers

From the provisions of Section 8.2 of the form of agreement signed by Sutherland, it is clear that the terms of Sutherland's offer did not bind the Trustees to accept that offer (regardless of the fact that it was substantially more than the appraised value of the property) but permitted the Trustees to seek other offers and to accept the highest offer received. The offer was made irrevocable for 120 days to enable the Trustees to evaluate the offer in light of all relevant circumstances and to seek firm offers from others who had expressed an interest in the property.[4]

The distinction between this case and those cited by Sutherland is that the cited cases involved offers which the trustee had accepted and submitted to the court for confirmation. In those cases it was held that the court abused its discretion in approving a later—though slightly higher—offer than the one accepted by the trustee. Here, Sutherland's offer was never accepted by the Trustees or submitted to the Court. Where a bid has not been accepted, the bidder cannot be heard to complain that the sale was subsequently abandoned, *Blossom v. Railroad Co.*, 70 U.S. 196 (1865), or that a resale was ordered with an opportunity for the original bidder or bidders to participate. *J. J. Sugarman Co. v. Davis*, 203 F.2d 931 (10th Cir. 1953).

4. In the parlance of the securities markets, the Trustees bought a "put" on the property exercisable within 120 days; in other words, the Trustees at any time within 120 days could require Sutherland to buy the property for $454,000. They were not, however, bound to sell the property to Sutherland for that price—or any price.

IV. The Trustees Were Under a Duty to Accept the Best Offer Attainable for Submission to the Court

It is not possible to read *In re Stanley Engineering Corp.*, 164 F.2d 316 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), or any of the other cases cited by Sutherland as condemning the Trustees' action in eliciting bids from would-be purchasers, because one of them had made a formal offer for the property. Indeed, far from diminishing confidence in judicial sales and reducing the amounts to be received therefrom, such competition tends to develop the highest attainable values for the debtor's assets. In *Stanley Engineering* there was spirited competitive bidding. In *Smith v. Save-Rite Drug Stores*, 178 F.2d 507 (10th Cir. 1949), the sealed bid procedure was utilized and seven bids were received. *In re Marathon Foundry & Machine Co.*, 239 F.2d 122 (7th Cir. 1956), *cert. denied*, 353 U.S. 912 (1957), involved the sale of the debtor's stock ownership in another corporation. The sale attracted several bids, the highest of which was submitted to the court and ultimately confirmed.

Sutherland's purported concern for the welfare of the Penn Central estate because of the alleged unfairness of asking for sealed bids in this case is unfounded. Bidders at judicial sales and offerors at private sales acquire no rights—and here Sutherland had no reason to suppose that it acquired any rights (see Section 8.2)—until their bid or offer has been accepted.[5]

5. In connection with the effect of the sealed bid procedure upon the estate, it should be noted that the Penn Central reorganization is rapidly drawing to a close; the Court has fixed October 24, 1978, as the date for consummation of the reorganization. In re Penn Central Transp. Co., No. 70-347, Consummation Order and Final Decree at 9 (E.D. Pa. Aug. 17, 1978).

In affirming the Reorganization Court's approval of the sale to Yacht Club-Kister, the Third Circuit has not departed from the principles laid down in *Stanley Engineering*, which holds it to be an abuse of discretion for a court to fail to confirm a sale to the high bidder at a judicial sale for the reason that a somewhat higher bid is made at the confirmation hearing. Here, the Reorganization Court did confirm a sale to the high bidder at a judicial sale conducted under a sealed bid procedure, and the Third Circuit properly affirmed that action. It would be a clear abuse of discretion for the trustee to accept, and the court to approve, the lesser of two such bids. *Kimmel v. Crocker*, 72 F.2d 599 (10th Cir. 1934).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK WILLCOX, JR.
HERBERT G. SCHICK
HEPBURN, ROSS, WILLCOX & PUTNAM
2010 Two Penn Center Plaza
Philadelphia, Pa. 19102
Attorneys for Trustee of The Pittsburgh, Youngstown & Ashtabula Railway Company, Secondary Debtor

CARL HELMETAG, JR.
EUGENE E. ANDERSON, JR.
3100 IVB Building
1700 Market Street
Philadelphia, Pa. 19103
Attorneys for Trustees of Penn Central Transportation Company, Debtor

Dated: September 13, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Brief for Respondents in Opposition, Trustees of the property of Penn Central Transportation Company, Debtor, and Trustee of the property of The Pittsburgh, Youngstown & Ashtabula Railway Company, Secondary Debtor, to be mailed, by first class mail, postage prepaid, to the following:

JOSEPH S. GILL, ESQ.
100 East Broad Street
Columbus, Ohio 43215

Dated at Philadelphia, Pennsylvania, this 13th day of September, 1978.

CARL HELMETAG, JR.